

**Draft Proposed Board Order**



184

STATE OF MAINE  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

PAUL R. LEPAGE  
GOVERNOR

DARRYL N. BROWN  
COMMISSIONER

**Staff Recommendation**

**DRAFT**

**BOARD ORDER**

**IN THE MATTER OF**

**Berwick Iron & Metal Recycling Inc.  
York County  
Berwick, Maine  
A-1041-71-A-N**

**Appeal of  
Air Emission License  
Board  
Findings of Fact and Order  
(Denial)**

Pursuant to the provisions of 38 M.S.R.A. §341-D(4) and §590, 06-096 CMR 115 (Major and Minor Source Air Emission License Regulations), and 06-096 CMR 2 (Rules Concerning the Processing of Applications and Other Administrative Matters), the Board of Environmental Protection (Board) has considered the appeal filed by Jeanette and Doug Seivwright, Robert and Donna Duffy, Tom and Carol Planche, and Joyce and Raymond Provencher (the Appellants) of the Department's approval of the license A-1041-71-A-N issued to Berwick Iron & Metal Recycling, Inc. (the Licensee). Based on materials in the Department's files, the appeal documents and the licensee's response to the appeal, the Board finds the following facts:

1. History

The facility is located in Berwick, Maine and was operating as a scrap iron and metal recycling facility. On July 27, 2010, the Department received an application from Berwick Iron & Metal Recycling, Inc. (Berwick) for an initial air emission license to permit operation of a diesel powered metal shredder. The application was assigned number A-1041-71-A-N. The application was processed and issued on October 27, 2010.

On November 26, 2010, the Appellants, represented by David B. Van Slyke, Jeffrey D. Talbert and Timothy S. Murphy, submitted an appeal to the Board alleging:

AUGUSTA  
17 STATE HOUSE STATION  
AUGUSTA, MAINE 04333-0017  
(207) 287-7688 FAX: (207) 287-7826  
RAY BLDG., HOSPITAL ST.

BANGOR  
106 HOGAN ROAD, SUITE 6  
BANGOR, MAINE 04401  
(207) 941-4570 FAX: (207) 941-4584

PORTLAND  
312 CANCO ROAD  
PORTLAND, MAINE 04103  
(207) 822-6300 FAX: (207) 822-6303

PRESQUE ISLE  
1235 CENTRAL DRIVE, SKYWAY PARK  
PRESQUE ISLE, MAINE 04679-2094  
(207) 764-0477 FAX: (207) 760-3143

1. procedural inadequacies in the processing and issuance of the License;
2. the generator and metal shredder were constructed without a permit to do so;
3. BACT and federally enforceable operation limits are not sufficiently referenced in the License;
4. lack of appropriate reporting and other requirements for enforcing applicable operational and emission limits; and
5. issuance of the license without adequate ambient air quality analysis.

On December 30, 2010, Berwick, represented by Matthew D. Manahan, submitted a response to the Appeal of its License.

2. Standing

By correspondence dated December 6, 2010, the Board of Environmental Protection indicated the Appeal was filed in a timely manner within 30 days of the filing of the license decision with the Board.

Under provisions of the Department's *Rules Concerning the Processing of Applications and Other Administrative Matters*, 06-096 CMR 2, an aggrieved person may appeal to the Board for review of the Commissioner's licensing decision. An aggrieved person is defined as "any person whom the Board determines may suffer particularized injury as a result of a licensing or other decision." The Board finds that, under the circumstances of this case, Appellants who live adjacent to or in the vicinity of the Berwick facility satisfy the governing requirements for administrative standing.

3. Findings and Conclusions Objected To

The Appellants object to the issuance of Air Emission License A-1041-71-A-N to Berwick Iron & Metal Recycling, Inc.

4. Basis for Appeal

Appellants allege that: (1) Berwick has already built a significant portion of its proposed auto shredding facility without a state license in violation of 06-096 CMR 115; and (2) by installing the shredder Berwick is changing from an operation with no need for an air emission license to one that is licensed, with operational and fuel use limits, to emit 20 tons of nitrogen oxide, 8.73 tons of carbon monoxide, 1.23 tons of particulate matter and PM10, 0.92 tons of volatile organic compounds, and 0.92 tons of sulfur dioxide annually, possibly creating a dramatic change in the current air quality in the neighborhood.

The Appellants further state that Berwick's license was not appropriately reviewed or issued by the Department in that:

1. the DEP did not process the application properly, thus handicapping the Appellants' notice of and ability to respond to the issued license;
2. Berwick began construction before obtaining necessary local and state licenses;
3. the license does not reference all operational and emission standards that apply;
4. the license does not require any robust reporting or means of monitoring Berwick's hourly operating limitations;
5. the license lacks adequate ambient air quality analysis for Berwick's site.

5. Remedy Requested

The Appellants request that: (1) the License be modified to require additional operational controls on the Licensee to ensure strict compliance with hours of operation and fuel usage; and (2) the remainder of the License be remanded to the DEP for a full technical review and analysis of Berwick's BACT, ambient air quality standards and automobile shredder fluff particulate impacts.

6. Response to Appeal

A. Procedural irregularities:

In his letter dated October 19, 2010, Mr. Timothy Murphy, representing the Appellants, stated: "... an applicant pursuing more than one application may be required to submit all other applications before any such application will be accepted as completed for processing", and "The very nature of the application (for an automotive shredder and diesel drive unit) demonstrated that BI&MR also needed a Solid Waste Processing Facility License".

On November 29, 2010, the Bureau of Air Quality responded, indicating the use of the word "may" in 06-096 CMR 2, 11(C) does not impose a mandatory requirement that all applications be received before an application to the Bureau of Air Quality (BAQ) is accepted as complete for processing in all instances. Instead this provision merely allows the Commissioner, in his or her discretion and on a case by case basis, to impose that requirement.

The Commissioner imposed no such requirement as to Berwick's application to the Bureau of Air Quality. The BAQ typically receives and processes several hundred applications per year with full knowledge that licenses from other DEP programs may be required. The provision in 06-096 CMR 2 is rarely invoked and generally only in those applications of statewide significance such as liquefied natural gas receiving facilities. Berwick's application did not rise to that level of significance.

Mr. Murphy's letter of November 26, 2010 further states: "... it appears that the Air Bureau did not publish the date it accepted BI&MR's applications as complete for processing. The report covering the time period between May 21, 2010 and September 9, 2010 as posted on the Board of Environmental Protection's ("BEP") website do not contain notice regarding the Air Bureau's acceptance of BI&MR's applications. As a result, the general public was not afforded the ability to file a request for public hearing or BEP jurisdiction on BI&MR's air application as provided under 06-096 CMR 2 § 17(A)."

The Board finds that, due to an oversight, the Commissioner did not notify the Board of Environmental Protection that Berwick's application was accepted as complete for processing pursuant to 38 MRSA § 344(1). However, it does not appear that the failure to do so in this case deprived the public of any rights regarding participation or otherwise aggrieved any party. Berwick did publish the required public notice that it was filing an application with the BAQ in the Foster's Daily Democrat on June 17, 2010 to inform residents of the Berwick area that the application was being submitted. Further, a copy of the application was filed with the Berwick Town Office for public inspection on or about June 16, 2010 and was filed with the DEP on June 21, 2010. These actions provided the general public with the opportunity to become informed about the nature of the application as well as the opportunity to request a public hearing.

The Appellants also argue that the Department did not provide them with a copy of the signed license and their appeal rights as required by 06-096 CMR 2 § 18(B).

The Department acknowledges that it did not send a copy of the license to the Appellants when it was signed. The copy of the signed license was forwarded to Mr. Murphy on November 15, 2010. However, Appellants do not explain why this delay resulted in any meaningful prejudice to them, and no such prejudice is apparent from the record.

B. Construction commenced without permit

The Board finds that Berwick Iron & Metal Recycling, Inc. did commence construction prior to obtaining necessary state permits, however, neither the diesel engine nor the shredder have been operated. The commencement of construction without a permit is an issue for potential enforcement review, but is not a basis to overturn the permit on appeal.

C. BACT Analysis and Operating Limits

In its application, Berwick submitted a BACT analysis. Upon review of that analysis, staff requested that Berwick submit supplemental BACT information addressing certain questions about the analysis. BACT control requirements for engines of this size and type are based on a review of the EPA RACT/BACT/LAER Clearinghouse as well as previous BAQ licensing decisions on similar units. The Department's review of the BACT analysis, the EPA Clearinghouse and past licensing decisions determined that additional pollution control equipment was not required.

Operational limits for diesel engines of this type are usually expressed as tons of pollutant per year, gallons of fuel use per year, hours of operation per year and mass and/or concentration of a pollutant passing thru the stack. The license allows the shredder to burn up to 150,000 gallons of ultra low sulfur diesel per year. The firing rate of the unit (gallons per hour) in combination with the yearly fuel use limit roughly equates to 2000 hours per year of operation as presented in the application. The fuel cap maintains the facility below major source thresholds, and it is therefore considered a synthetic minor facility. The BAQ does not require daily, weekly, monthly or yearly hours of operation for diesel units as those limits are best decided by the local planning board, and are not an efficient means of regulating air quality.

Fuel Inventory Tracking:

The Air Emission License issued to Berwick concerns the shredder and diesel drive; mobile equipment is not addressed or regulated by the Bureau of Air Quality. As noted above, the annual fuel use limit on the diesel unit is enforceable by EPA and DEP. BAQ compliance staff routinely review compliance with fuel use limits during their inspections. Exceeding this limit may alter the status of the facility as a synthetic minor and could result in an enforcement action with associated penalties.

Special Conditions 16(B) and 20:

With respect to the purported inconsistency between Special Conditions 16(B) and (20), Special condition 16(B) establishes the fuel limit, in gallons per calendar year of diesel fuel, and the method of demonstrating compliance with this limit, as the fuel is presently stored and used in the Diesel Drive.

Special condition (20) allows Berwick to construct, at some time in the future, should it desire to do so, a common fuel storage tank to service both the diesel unit and the source's mobile equipment. If that occurs a fuel flow meter must be installed on the fuel line to the Diesel Drive to record the quantity of fuel delivered to that unit. Berwick is required to maintain records from the supplier showing quantity, type of fuel delivered and the sulfur content of the fuel.

Therefore, the Board finds that these two special conditions are not inconsistent.

D. Ambient Air Quality Analysis:

Regarding an ambient air quality analysis, the Board finds that Berwick is limited to 20 tons per year of NO<sub>x</sub> emissions, an amount considerably less than the 100 tons per year threshold for additional analysis or air dispersion modeling as required in 06-096 CMR 115. No ambient air quality analysis is required as the facility is below the thresholds requiring such.

E. Request for a Public Hearing:

In his letter addressed to Susan Lessard, Chair of the Board of Environmental Protection, dated November 26, 2010, Mr. Van Slyke, on behalf of the Appellants, requests a public hearing be held on this matter.

06-096 CMR 2, Section 7(A)(B) states: "... The Department will hold public hearing in those instances where the Department determines there is credible conflicting technical information regarding a licensing criterion and it is likely that a public hearing will assist the decision maker in understanding the evidence. ..."

The Board finds that the Appellants have not submitted any conflicting technical information, but instead the Appellants indicate they will hire necessary air licensing consultants assuming a hearing is scheduled. Since there is no credible conflicting information regarding a licensing criterion in the record, there is no basis for the Board to hold a public hearing.

190

Berwick Iron & Metal Recycling Inc.  
York County  
Berwick, Maine  
A-1041-71-A-N

7

Appeal of  
Air Emission License  
Board  
Findings of Fact and Order  
(Denial)

BASED on the above findings, the Board concludes that:

1. The appellant filed a timely appeal;
2. The procedural errors that occurred in the course of the Department's review of the permit application caused no demonstrated prejudice to the Appellants and did not affect the substantive decision;
3. To the extent Berwick commenced construction prior to issuance of the required permit, that is appropriately a matter for the Department's enforcement review, and not a basis to overturn or otherwise amend the permit decision;
4. The license properly references applicable operational and emissions standards, including monitoring requirements;
5. An ambient air quality analysis was not required in connection with the permit application.
6. The record contains no credible conflicting evidence regarding a licensing criterion, and a public hearing will not be helpful to the Board.

THEREFORE, the Board DENIES the request for a public hearing, DENIES the appeal and AFFIRMS Department Order A-1041-71-A-N.

DONE AND DATED IN AUGUSTA, MAINE THIS  
BOARD OF ENVIRONMENTAL PROTECTION

DAY OF \_\_\_\_\_, 2011.

BY: \_\_\_\_\_  
SUSAN M. LESSARD, CHAIR